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CHEGNE PECK PENG v. HICOM-GAMUDA DEVELOPMENT SDN BHD

HIGH COURT MALAYA, SHAH ALAM
HAZIZAH KASSIM JC
[CIVIL SUIT NO: BA-22NCvC-300-07-2023]
B 24 SEPTEMBER 2025

Abstract – *A property owner's failure to exercise due diligence during renovations can break the chain of causation. Specifically, carrying out extensive works, without professional engineering consultations or compliance with established covenants, constitutes an intervening event. This shifts the legal responsibility for a structural failure from the original builder to the owner's own actions.*

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D ***TORT:*** *Negligence – Duty of care – Collapse of retaining wall built by developer – Claim by subsequent purchaser of property against housing developer – Duty imposed on entities designing and constructing buildings – Whether developer owed duty of care to subsequent purchaser despite absence of contractual relationship*

E ***TORT:*** *Negligence – Claim – Novus actus interveniens – Claimant carried out extensive renovations to property – Failure to appoint qualified professionals or conduct structural studies – Collapse of retaining wall erected by developer – Whether developer owed duty of care to claimant – Whether developer breached duty of care owed to claimant – Whether acts of claimant in carrying out extensive renovations to property amounted to novus actus interveniens which tantamount to break in chain of causation – Whether res ipsa loquitur applied*

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The plaintiff owned a piece of land together with a bungalow erected thereon ('property'). The defendant was the developer of a housing development known as the Kota Kemuning Hills. The property, one of the houses developed by the defendant in Kota Kemuning Hills, was situated on a
G sloping terrain directly adjacent to a pond and the back portion of the property was supported by a boundary retaining wall. In 2009, the plaintiff purchased the property from one Mohd Effendi who had previously acquired it from the defendant. Between October 2010 and July 2011, the plaintiff carried out renovation works on the property, namely a swimming pool, a
H koi pond and a barbecue area with tiled flooring. The plaintiff and her family moved into the property around May 2012. Problems arose when the retaining wall collapsed in 2018. The plaintiff commenced the present suit against the defendant for negligence in building the retaining wall with an inadequate factor of safety which caused it to collapse. The issues that arose were, *inter alia*, (i) whether the defendant owed a duty of care to the plaintiff;
I (ii) whether the defendant had breached its duty of care owed to the plaintiff;

and (iii) whether the act of the plaintiff, in installing the swimming pool and koi fish pond amounted to a *novus actus interveniens* which tantamount to a break in the chain of causation.

Held (dismissing claim):

(1) It did not matter that the plaintiff was a subsequent purchaser of the house and did not have a contract with the defendant. As the developer who constructed the plaintiff's house and the retaining wall, a duty of care must be imposed on the defendant to ensure that those structures were built safely and properly. The law imposed a duty of care on entities which designed and/or constructed buildings. (paras 27-28)

(2) All the experts agreed that groundwater from other houses and the catchment area can flow into the plaintiff's house as her house was the lowest elevation in that area. However, this was not conclusive evidence to say that the groundwater flowing into the plaintiff's house at the lowest elevation was coming from rain. Even if it rained, the plaintiff bore the burden of proving that the water flowing to the ground of the plaintiff's property can cause the groundwater level to exceed 2m to 3m. (paras 59 & 60)

(3) There was no reported evidence that the plaintiff's renovation works of the bungalow proper in 2010 to 2011 had disturbed the soil strength behind the retaining wall in a manner that could affect the structural integrity of the retaining wall. In other words, it indicated a lack of evidence since the experts would form an opinion based on the documents presented to them. The plaintiff also failed to call the contractor responsible for the renovation and construction of the swimming pool to provide evidence regarding the extent of soil extraction and the design of the pool, including its weight. (paras 75-76)

(4) The renovations in 2010 carried out by the plaintiff were an intervening event. The plaintiff failed to comply with item 4 of the deed of mutual covenant and did not appoint a consultant or any qualified professional to renovate her house, including inspecting the current foundation and structural design to ensure that all renovations were properly engineered. It was important for the plaintiff to carry out the study, knowing that the property was next to the retaining wall. (paras 85 & 86)

(5) The plaintiff could not rely on the doctrine of *res ipsa loquitur,* and it did not apply in this case. Not only did the defendant lack exclusive control over the property but the plaintiff also carried out extensive renovations on the land prior to the collapse of the retaining wall. (para 108)

Case(s) referred to:

Ahmad Jaafar Abdul Latiff v. Dato' Bandar Kuala Lumpur [2014] 9 CLJ 861 FC ***(refd)***

Ahmad Rubil Ahmad & Ors v. Minda Muhibah Sdn Bhd & Anor; Terminal Bersepadu Gombak Sdn Bhd & Ors (Third Parties) [2024] 2 CLJ 73 HC ***(refd)***

Bina Puri Sdn Bhd v. MUI Continental Insurance Bhd [2009] CLJU 1032; [2009] 1 LNS 1032 HC ***(refd)***

Bruce v. Oldham Press Ltd [1936] 1 KB 697 ***(refd)***

Iftikar Ahmed Khan v. Perwira Affin Bank Bhd [2018] 1 CLJ 415 FC ***(refd)***

Johara Bi Abdul Kadir Marican v. Lawrence Lam Kwok Fou & Anor [1980] CLJU 199; [1980] 1 LNS 199 FC ***(refd)***

Ketua Pengarah Jabatan Kerja Raya v. Strongkota Development Sdn Bhd & Another Appeal [2016] 3 CLJ 741 CA ***(refd)***

Letchumanan Chettiar Alagappan (As Executor To SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd [2017] 5 CLJ 418 FC ***(refd)***

Lim Teck Kong v. Dr Abdul Hamid Abdul Rashid & Anor [2006] 1 CLJ 391 CA ***(refd)***

Lloyde v. West Midlands Gas Board [1971] 1 WLR 749 ***(foll)***

Lok Kok Beng & Ors v. Loh Chiak Eong & Anor [2015] 7 CLJ 1008 FC ***(refd)***

PB Malaysia Sdn Bhd v. Samudra (M) Sdn Bhd [2008] CLJU 679; [2008] 1 LNS 679 HC ***(refd)***

Ranchhodbhai Somabhai & Anor v. Babubhai Bhailalbhai & Ors AIR 1982 GUJ 308 ***(refd)***

Selvaduray v. Chinniah [1939] CLJU 107; [1939] 1 LNS 107 SC ***(refd)***

Syed Abu Bakar Ahmad v. PP [1984] 1 CLJ 80; [1984] 1 CLJ (Rep) 368 FC ***(refd)***

Tenaga Nasional Malaysia v. Batu Kemas Industri Sdn Bhd & Another Appeal [2018] 6 CLJ 683 FC ***(refd)***

Teoh Guat Looi v. Ng Hong Guan [1998] 4 CLJ 416 CA ***(refd)***

The Co-operative Central Bank Ltd v. KGV & Associates Sdn Bhd [2008] 2 CLJ 545 FC ***(refd)***

U Television Sdn Bhd & Anor v. Comintel Sdn Bhd [2017] 10 CLJ 580 FC ***(refd)***

Legislation referred to:

Evidence Act 1950, ss. 45(1), 101, 102

Rules of Court 2012, O. 18 r. 8(1)

Evidence Act 1872 [Ind], ss. 101, 102

For the plaintiff - Clinton Tan Kian Seng & Harishdeep Singh; M/s Clinton Tan

For the defendant - Joshua Ho Fung Lym & Nurul Hanan Azamuddin; M/s Raj, Ong & Yudistra

Reported by Lina E

JUDGMENT

Hazizah Kassim JC:

Introduction

[1] The plaintiff in the present suit is suing the defendant for negligence in building the retaining wall in 2005 with an inadequate factor of safety (FoS), which allegedly caused it to collapse in 2018.

Parties

[2] The plaintiff owns a piece of land registered under HS(D) 77860 PT 91972, Mukim Klang, District of Klang, State of Selangor, together with a two and 1/2 storey bungalow at No. 1, Jalan Anggerik Vanda 31/168, Seksyen 31, Kota Kemuning Hills, 40460 Shah Alam (the property).

[3] The defendant is the developer of a housing development known as the Kota Kemuning Hills. The property is one of the houses developed by the defendant in Kota Kemuning Hills.

[4] The property is situated on a sloping terrain directly adjacent to a pond within the Kota Permai Golf and Country Club. The back portion of the property is supported by a boundary retaining wall (the "retaining wall").

[5] On 30 December 2009, the plaintiff purchased the property from Mohd Effendi bin Norwawi, who had previously acquired it from the defendant.

[6] From October 2010 to July 2011, the plaintiff carried out renovation works on the property. A swimming pool was constructed, along with a koi pond and a BBQ area, which had tiled flooring laid. The plaintiff and her family moved into the property around May 2012.

[7] The plaintiff also pleaded that over the years, she and her family frequently used the swimming pool and regularly hosted dinners and parties with friends and family.

[8] First and foremost, this court wishes to express its gratitude to learned counsel for the plaintiff, Mr Jason, and learned counsel for the defendant, Mr Chan, for their comprehensive submissions before this court.

[9] This court also wishes to thank the experts appointed by both parties who attended the trial and participated in the hot tubbing session to help me resolve the technical issues related to this claim.

[10] The trial was conducted over a period of two days on 19 May 2025 and 4 June 2025.

[11] Six witnesses have been called during the trial, including two experts from each party.

List Of Agreed Opinions (Bundle L)

[12] Following the hot tubbing session, the four experts signed the list of agreed opinions, which has been filed before this court and marked as bundle L. I accepted the evidence from Mr Cheah Siew Wai and Dr Wong Fook Keong, as well as the witnesses for the defendant, Dr Toh Cheng Teik and Chen Chean Sin, as experts pursuant to s. 45(1) of the Evidence Act, since they are independent and skilled in the area in which they provided evidence.

[13] All four experts agree that the retaining wall collapsed due to a rise in the groundwater level behind it.

[14] Therefore, the critical question to be determined is where the groundwater came from.

Issues To Be Decided

[15] A list of issues to be decided as agreed by parties is as follows:

(i) whether the defendant owes a duty of care to the plaintiff as pleaded in para. 26 of the statement of claim dated 16 November 2021 (the "SOC");

(ii) if issue (i) above is answered in the positive, whether the defendant had breached its duty of care owed to the plaintiff as pleaded in para. 27 of the SOC;

(iii) whether the act of the plaintiff in installing the swimming pool and koi fish pond amounts to a *novus actus interveniens* which tantamount to a break in the chain of causation;

(iv) if issues (i) through (iii) above are answered in the positive, whether the defendant is liable to pay the plaintiff general damages and/or the special damages pleaded in para. 28 of the SOC; and

(v) whether the plaintiff's claim is barred by limitation as pleaded in para. 39 of the defence dated 5 January 2022.

Legal Principles

Negligence

[16] In *Ahmad Rubil Ahmad & Ors v. Minda Muhibah Sdn Bhd & Anor; Terminal Bersepadu Gombak Sdn Bhd & Ors (Third Parties)* [2024] 2 CLJ 73; [2023] MLJU 2605 the court held that:

> The tort of negligence requires proof of specific elements before it is established, despite carelessness on the part of the defendant and injury or damage sustained by the plaintiff. In *Blyth v. Birmingham Waterworks Co* (1856) 11 Ex 781, Anderson B said:
>
> > ... that negligence is the mission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do: or doing something which a prudent and reasonable man would not do.

[17] In *Lok Kok Beng & Ors v. Loh Chiak Eong & Anor* [2015] 7 CLJ 1008; [2015] 4 MLJ 734, the Federal Court held:

To put it in a nutshell, the preferred test is the three-fold test, where the requirements of foreseeability, proximity and policy considerations must exist in any claim for negligence. The three-fold test has been recognised by the House of Lords in *Caparo Industries plc v. Dickman* [1990] 2 AC 605, as the elements giving rise to a duty of care. In the judgment of Lord Bridge in *Caparo* at pp. 617-618, His Lordship said that:

> What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other.
>
> The most difficult ingredient to prove in establishing a duty of care is the requirement of sufficient proximity between the claimant and the defendant. The court would have to look at the closeness of the relationship between the parties and other factors to determine sufficient proximity based on the facts and circumstances of each case. These factors are likely to vary in different categories of cases.

Burden Of Proof

[18] With regards to the burden of proof, this court is relying on the case of *U Television Sdn Bhd & Anor v. Comintel Sdn Bhd* [2017] 10 CLJ 580; [2017] 5 MLJ 292 and *Letchumanan Chettiar Alagappan (As Executor To SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd* [2017] 5 CLJ 418; [2017] 5 MLJ 292 at 306.

[19] The Federal Court in *U Television Sdn Bhd & Anor v. Comintel Sdn Bhd* [2017] 10 CLJ 580; [2017] 5 MLJ 292 held as follows:

> [35] On the meaning and application of the term 'burden of proof' s. 101 of the Evidence Act 1950 ('the Act') states that **it is the burden to establish a case which rests throughout on the party who assert the affirmative of the issue.** The 'burden of proof' in s. 102 of the Act is the burden to adduce evidence, to make out or rebut the claim. The 'burden of proof' in s. 102 of the Act shifts from one side to the other according to the weight of the evidence. (emphasis added).

[20] This court also refers to the Federal Court's decision in *Letchumanan Chettiar Alagappan (As Executor To SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd* (*supra*), His Lordship Jeffrey Tan FCJ cited with approval the principle laid down in the case of *Ranchhodbhai Somabhai & Anor v. Babubhai Bhailalbhai & Ors* AIR 1982 GUJ 308 as regards the 'burden of proof' to establish a case which never shift and the shifting burden to adduce evidence in the context of ss. 101 and 102 of the Indian Evidence Act 1872 which are identical to ss. 101 and 102 of our Act as follows:

> *It is also well to bear in mind that there is an essential distinction between 'burden of proof' and 'onus of proof'; burden of proof lies upon the person who has to prove a fact and it never shifts,* but the onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence (see *Raghavamma v. Chenchamma* AIR 1964 SC 136).
>
> Burden of proof has two distinct meanings, namely, *(i) the burden of proof as a matter of law and pleadings, and (ii) the burden of proof as a matter of adducing evidence.*
>
> Section 101 of the Evidence Act deals with the former and s 102 of the Evidence Act with the latter. The first remains constant but the second shifts. *In a claim application, therefore, the burden of proof, in the first sense, certainly lies on the claimant.* If he examines himself and his witness, if any, and if the evidence, tested in the light of the principles set out above, is found to be acceptable, the onus shifts on the tortfeasor to prove those circumstances, if any, which dislodge the assertions of the claimants. If the tortfeasor fails to prove before the court any fact or circumstance which tends to affect the evidence led by the claimant, the claimant would be entitled to ask the court to hold that he has established the case and, on that basis, to make a just award it would thus appear, that though the legal burden – *the burden as a matter of law and pleadings – remains constant on the claimant,* the burden as a matter of adducing evidence changes often times as the trial of the claim petition progresses. (emphasis added)

Issue (i): Whether The Defendant Owes A Duty Of Care To The Plaintiff As Pleaded In para. 26 Of The Statement Of Claim Dated 16 November 2021 (The "SOC")

[21] It is pertinent for this court to decide whether, under the law, there is a duty of care imposed on the defendant.

[22] This court refers to the Federal Court's case of *The Co-operative Central Bank Ltd v. KGV & Associates Sdn Bhd* [2008] 2 CLJ 545; [2008] 2 MLJ 233, which decides:

> In the final analysis, we readily appreciate that the Court of Appeal acted precisely on the same tests adopted by this Honourable Court in *Ampang Jaya*'s case. The Court of Appeal basically holds the view that each case must be decided on its particular facts to establish if a duty of care exists.

[23] This suggests that each case must be decided on its particular facts to determine whether a duty of care exists.

[24] This court refers to para. 26 of the amended statement of claim, which reads as follows:

> Based on the foregoing, the Plaintiff contends that the Defendant owes a duty of care to the Plaintiff to:
>
> 26.1. Construct the Retaining Wall with a sufficient FOS value;
>
> 26.2. Exercise reasonable care and skill in constructing the Property, and in particular the Retaining Wall to ensure the safety of the same;

26.3. Possess the reasonably expected standard of a competent developer in constructing the Property, and in particular the Retaining Wall; and/or

26.4. Take all reasonable steps to ensure that the Retaining Wall is structurally safe upon its inspection and repair of the same in October 2010.

[25] To support their argument, the plaintiff cites the case of *Tenaga Nasional Malaysia v. Batu Kemas Industri Sdn Bhd & Another Appeal* [2018] 6 CLJ 683; [2018] 5 MLJ 561, where Jeffrey Tan FCJ stated:

> [50] *Caparo*'s 'three-fold test' to determine a new situation duty of care, encompassed public policy concerns, probably, to limit 'a liability in an indeterminable amount for an indeterminable time to an indeterminable class' (*Ultramares Corporation v. Touche* 174 NE 441 (1932) per Cardozo CJ) if Lord Atkin's neighbour principle were applied without restriction. For a duty of care to arise in negligence: (i) harm must be reasonably foreseeable as a result of the defendant's conduct (as established in *Donoghue v. Stevenson*); (ii) the parties must be in a relationship of proximity; and (iii) it must be fair, just and reasonable to impose liability.

[26] The plaintiff relies on pure economic loss and refers to the case of *Lim Teck Kong v. Dr Abdul Hamid Abdul Rashid & Anor* [2006] 1 CLJ 391; [2006] 3 MLJ 213 which states:

> [36] Anyway, in the present appeal, we are of the view that the losses by the plaintiffs were not pure economic losses. The evidence shows that the damages suffered by the plaintiffs were the loss of the bungalow which collapsed a few years after it was built on that site where the first defendant failed to conduct thorough tests on the site, whether it was safe to build a building as designed by the first defendant on that site. It was the duty of the first defendant as consultant employed by the plaintiffs to ensure that it was safe to build the building on that site.

[27] The plaintiff argued that "the entire concept of negligence is to extend liability beyond the borders of privity". Therefore, it does not matter that the plaintiff is a subsequent purchaser of the house and does not have a contract with the defendant. As the developer who constructed the plaintiff's house and the retaining wall, a duty of care must be imposed on the defendant to ensure that those structures were built safely and properly.

[28] This court agrees with the plaintiff that the law imposed a duty of care on entities which designed and/or constructed buildings.

[29] Therefore, in relation to issue (i) regarding whether the defendant owes a duty of care to the plaintiff as outlined in paras. 26.1, 26.1, and 26.3 of the statement of claim dated 16 November 2021, this court responds in the affirmative.

Issue (ii): Whether The Defendant Had Breached Its Duty Of Care Owed To The Plaintiff As Pleaded In para. 27 Of The SOC

[30] Regarding the breach of duty of care, the plaintiff has pleaded as follows:

> 27. The Plaintiff further contends that the Defendant has breached its duty of care owed to the Plaintiff. In this regard:
>
> 27.1. The Defendant failed to construct the Retaining Wall with a sufficient FOS value, resulting in its collapse on 6.12.2018;
>
> 27.2. The Defendant did not possess the reasonably expected standard of a competent developer in constructing the Property, in particular the Retaining Wall;
>
> 27.3. The Defendant failed to exercise reasonable care and skill in constructing the Property, in particular the Retaining Wall to ensure the safety of the same;
>
> 27.4. The Defendant failed to take all reasonable steps to ensure the structural safety of the Retaining Wall upon it having inspected and carried out repair works on the same in October 2010; and/or
>
> 27.5. Further or alternatively, the only inference that can be drawn from the circumstances which led to the collapse of the Retaining Wall is that the Defendant was negligent. The Plaintiff will therefore rely on the doctrine of *res ipsa loquitur*.

[31] Having evaluated the pleadings and submissions by both parties, this court finds that:

(i) paragraph 27.2, which states – the defendant did not possess the reasonably expected standard of a competent developer in constructing the property, in particular the retaining wall and para. 27.3 – the defendant failed to exercise reasonable care and skill in constructing the property, particularly the retaining wall, to ensure its safety; this is a general objective test for negligence, rather than a particular act of negligence; and

(ii) paragraph 27.4 will not be considered, as both parties agree this is a non-issue.

[32] Therefore, in assessing the plaintiff's claim concerning breach of duty, this court will consider paras. 27.1 and 27.5 of the statement of claim.

Issue: Whether The Defendant Failed To Construct The Retaining Wall With A Sufficient FOS Value, Resulting In Its Collapse On 6 December 2018

[33] Based on this issue, it is relevant to ask whether the defendant erected the retaining wall according to the standard and after considering all parameters and the location of the plaintiff's property, which is situated at the lowest point.

[34] Following the collapse of the retaining wall, after discussion among parties, the following inspection and investigation has been carried out:

(i) the plaintiff conducted an inspection of the swimming pool and koi pond on the plaintiff's property on 24 April 2019 with the defendant's representative present;

(ii) the defendant engaged Zaidun Leng Sdn Bhd to conduct field tests and soil investigations. The test and SI were conducted in May and June 2019; and

(iii) on 5 July 2019, the plaintiff carried out a reticulation pipe test at the bungalow.

[35] A copy of the SI report was provided to the plaintiff on 27 August 2021. This suit was originally filed in the Sessions Court on 16 November 2021.

[36] Experts from both parties had referred to the soil investigation report.

[37] Further to that, the plaintiff pleaded in para. 23 of the statement of claim as follows:

> 23. Based on the foregoing, the Plaintiff contends that:
>
> 23.1. The Retaining Wall collapsed because it was structurally unsound in that it was not constructed with a sufficient "factor of safety" ("FOS") value. At all times since the construction of the Property, the Retaining Wall had a FOS value of approximately 0.997.
>
> 23.2. Pursuant to the Jabatan Kerja Raya's Guidelines for Slope Design, retaining walls should be constructed with a FOS value of 1.5 or more.
>
> 23.3. Further, it is accepted industry practice that buildings, including residential houses and its structures, should be constructed to stand for at least 65 years.

[38] Therefore, concerning whether the defendant failed to construct the retaining wall with an adequate FOS value, leading to its collapse on 6 December 2018, the material facts pleaded by the plaintiff are in paras. 23.1 and 23.2.

[39] It is a well-established rule that the burden of proving the case rests on the plaintiff and not on the defendant to disprove it. In *Selvaduray v. Chinniah* [1939] CLJU 107; [1939] 1 LNS 107; [1939] 1 MLJ 253, the Supreme Court held:

> The burden of proof under section 102 of the Evidence Enactment is upon the person who would fail if no evidence at all were given on either side and accordingly, the plaintiff must establish his case. If he fails to do so, it will not avail him to turn around and say that the defendant has not established his. The defendant can say it is wholly immaterial whether I prove my case or not. You have not proved yours.

[40] Learned counsel for the plaintiff submitted that all of the experts agreed that the cause of the retaining wall's collapse was that the groundwater level behind the wall had pushed the wall and caused it to collapse.

[41] The plaintiff relied on the expert-agreed opinion as per bundle L and argues that there are only two possible explanations, with only one remaining before this court. That explanation is that the groundwater came from rain that flowed underground from higher parts of the plaintiff's housing area to her house, which is located at the lowest point in that area. Unlike the defendant's explanation, this is supported by evidence.

[42] However, the defendant disagrees and maintains that water leakage from the swimming pool and house caused the collapse of the retaining wall, along with other factors such as the renovations carried out by the plaintiff without any investigation.

[43] Learned counsel for the plaintiff submits that the defendant's explanation is easily rebutted using bundle L.

[44] The plaintiff's explanation that the groundwater from rain is established by evidence and supported by bundle L, and I find that the plaintiff relied heavily on the opinion in paras. 1, 2, 4, and 5 of bundle L, as follows:

(i) item 1 – The plaintiff's house is at the lowest elevation compared to the other houses in that row/area of bungalows;

(ii) item 2 – The retaining wall collapsed due to a rise in the groundwater level behind it;

(iii) item 4 – The retaining wall would become unstable and susceptible to failure when the groundwater level reached a range between 2.0m and 3.0m; and

(iv) item 5 – Groundwater from other houses and the catchment area can flow into the plaintiff's house, as her house is at the lowest elevation in that area.

[45] Learned counsel for the plaintiff refers to the following evidence provided by Dr Wong (SP4).

> 68.1. It is common hydro-geological knowledge that the Bungalow site, being located at the lowest elevation of about RL 5 m *vis-à-vis* the rest of the effective catchment area (with its highest elevation at about RL 22.5 m) would receive the bulk of the groundwater seepage from the effective catchment area [para. 4.10, PDF p. 29, Bundle F].
>
> 68.2. Rain water falling on the vast land on both sides of the cross section (the line in Appendix A3) will infiltrate into the ground and will become part of the groundwater regime. The groundwater seepage will be directed towards the Bungalow (which is at the lowest point and beyond – *ie*, the pond and the golf course) [para. 4.10(ii), PDF p. 30, Bundle F].

> 68.3. The effective catchment area under investigation is very large *vis-à-vis* the Bungalow plot area and the quantity of rain water that this catchment will capture will also be correspondingly large *vis-à-vis* the rain failing within the Bungalow's plot area alone. The water infiltration will raise the GWL along the catchment's seepage path and this water seepage will accumulate at the Bungalow site which is near the lowest level. [para. 4.10(iv), PDF p. 31, Bundle F].

[46] Besides that, the plaintiff also relied on the defendant's expert, Ir Chen (SD1), who recognised in his expert report that rain would have caused a rise in groundwater levels in the plaintiff's property:

> During rain, the surface runoff will seep into subsoil which saturate the subsoil and may also rise up the ground water level. If there are cracks or voids on the surface drains, the amount of water seep into the subsoil will be more and much faster. [para. 8.0, PDF p. 50, Bundle I]

[47] This court noted that although there is an agreed opinion as per bundle L, I find the plaintiff failed to discharge her burden of proof that the defendant failed to construct the retaining wall with a sufficient FOS value, resulting in its collapse on 6 December 2018.

[48] This court also finds that the expert's conclusion that the collapse of the retaining wall was caused by groundwater level, rather than the reasons mentioned in para. 23.1 of the SOC, which states it collapsed due to being structurally unsound because it lacked a sufficient "factor of safety" ("FOS").

[49] As also pleaded in para. 23.1 of the SOC, I find that the plaintiff failed to prove on the balance of probabilities that, at all times since the construction of the property, the retaining wall had a FOS value of approximately 0.997.

[50] Ir Cheah, the plaintiff's expert witness, gave evidence during cross-examination regarding the factor of safety value. It is undisputed that the retaining wall has been standing for more than ten years, which negates the plaintiff's pleaded facts that, at all times since the construction of the property, the retaining wall had a FOS value of approximately 0.997. The relevant parts of the evidence are as follows:

> JH: You can explain that later when your counsel asks you in re-examination. So, that's something that you have to assume. So, the wall actually stood for more than a decade and I know that this is already 3 part of the agreed opinions, ok. It has stood for 13 years, 12 to 13 years 4 already. And the FOS that you have calculated is 0.997, was it?
>
> Cheah: Yes.
>
> JH: In your experience, would a wall with the factor of safety 0.997 be standing after 10 years? More than 10 years.

Cheah: Technically speaking, once FOS go below 1, the walls will be collapsed.

JH: Yes.

JH: So it wouldn't, it wouldn't be still standing after 10 years?

Cheah: No.

JH: If it is really below 1?

Cheah: Yes.

JH: So, in all likelihood, if it's still standing after 10, does it mean that it should be more than 1?

Cheah: Yes, it should be slightly more than 1.

[51] I also refer to para. (3) of bundle L, which states – none of the experts had access to the design/details other than the drawings provided.

[52] I hold that the burden is on the plaintiff to produce the detailed design report of the retaining wall by way of discovery.

[53] Next, I refer to para. (4) of bundle L, which states that the retaining wall would become unstable and susceptible to failure when the groundwater level reached a range between 2.0m and 3.0m.

[54] It is my considered opinion that the statement in para. 4 reflects the general view of the expert, and it does not definitively conclude that, at all times since the construction of the property, the retaining wall has maintained a factor of safety (FOS) value of 0.997.

[55] The evidence from Dr Toh (SD2), also relied upon by the plaintiff, is particularly significant when Dr Toh conceded under cross-examination that the plaintiff's housing area is on exposed terrain, which means rainfall can seep into the ground and flow from higher areas towards the plaintiff's house, located at the lowest part:

CTKS: Right, so what that means is that groundwater level will flow, or rather let me rephrase this. When rain, when there is rain, obviously the rain is not isolated to the Plaintiff's house. The rain falls in the entire housing area and when that happens, the rain will penetrate into the entire housing area, into the ground of the housing area. That's a fair statement, correct?

Dr Toh: It will penetrate when there is no concrete -

CTKS: I understand that. Then let me put it the other way. In the entire housing area, it's a fair statement to say that there is exposed terrain.

Dr Toh: Yes.

CTKS: Alright. Because there is exposed terrain, water will fall, rain water will fall and it will travel through the ground, underground. From high ground to lower ground, which is the Plaintiff's house. That's a fair statement, yes?

Dr Toh: Yes. [PDF pp. 182 & 183, Encl. 62]

[56] Having reviewed the notes of proceedings, this court finds that the evidence of Dr Toh did not end here; his evidence continued as follows and is important for this court to consider:

CTKS: Yes, and naturally if we were to consider the entire area: yes, there are houses; yes, there are certain parts in concrete; yes, there are roads. Having said that, there is still going to be a significant portion of the housing area that is soil, that is exposed to rain. That's a fair statement, yes?

Dr. Toh: I don't know about your term "significant".

CTKS: Sure.

Dr. Toh: You have not measured it, I have not measured it.

[57] In the submission of encl. 75, the plaintiff argues that it is impractical and impossible to provide an exact calculation of the amount of rainwater reaching the plaintiff's property. The main defence raised by the defendant in Annexure B of encl. 64 is that the plaintiff's experts supposedly did not supply any quantification or calculation regarding how much groundwater on the plaintiff's property originated from rain. However, the plaintiff failed to question the expert on whether such a calculation could genuinely be impossible to perform.

[58] Again, the plaintiff is relying on bundle L, which states: para. 1 – The plaintiff's house is at the lowest elevation compared to the other houses in that row/area of bungalows and para. 5 – Groundwater from other houses and the catchment area can flow into the plaintiff' house, as her house is at the lowest elevation in that area.

[59] Upon analysing the wording in para. 5 of bundle L, I find that all the experts agreed that groundwater from other houses and the catchment area can flow into the plaintiff's house, as her house is at the lowest elevation in that area. However, this is not conclusive evidence to say that the groundwater flowing into the plaintiff's house at the lowest elevation is coming from rain.

[60] Even if it rains, the plaintiff bears the burden of proving that the water flow to the ground of the plaintiff's property can cause the groundwater level to exceed 2.0m to 3.0m.

[61] In the case of *Bina Puri Sdn Bhd v. MUI Continental Insurance Bhd* [2009] CLJU 1032; [2009] 1 LNS 1032; [2010] 1 MLJ 347 at 377, Justice Nallini Pathmanathan (as she then was) referred to a study of rainfall records for the period, comparing them with the corresponding years before and immediately after the material period to determine the degree of certainty that such rainfall could be classified as 'excessive'. In *Bina Puri*, the plaintiff asserts that the cause of the damage was the failure of the wall due to excessive rainfall. To support his claim that the rainfall was excessive, the plaintiff's witness relied on rainfall records from the Jabatan Pengairan dan Saliran Malaysia for the months of January, March, April and June 1996.

[62] Therefore, this court finds that the argument claiming it is impractical and impossible to provide an exact calculation of the rainwater reaching the plaintiff's property is flawed.

Evaluation Of Bundle L

[63] I agree that, in this case before the court, expert evidence was necessary and this court was not equipped to decide on technical matters.

[64] This court is guided by the principle enunciated in the case of *U Television Sdn Bhd & Anor v. Comintel Sdn Bhd* (*supra*) and *Syed Abu Bakar Ahmad v. PP* [1984] 1 CLJ 80; [1984] 1 CLJ (Rep) 368; [1984] 2 MLJ 19 at p. 23 follows:

> Our law is clear in that under s. 45 of our Evidence Act 1950 it is provided that … The scope of this section can be found in the commentary in *Sarkar on Evidence* (12th Ed) at p 488 where, while recognising that opinion in so far as it may be founded on legal evidence shall be the function of the tribunal whose province alone it is to draw conclusions of law or fact: There are however cases in which the court is not in a position to form a correct judgment without help of persons who have acquired special skill or experience on a particular subject, *eg*, when the question involved is beyond the range of common experience or common knowledge or when special study of a subject or special training or special experience therein is necessary. In such cases the help of experts is required. In these cases, the rule is relaxed and expert evidence is admitted to enable the court to come to a proper decision.

[65] In *PB Malaysia Sdn Bhd v. Samudra (M) Sdn Bhd* [2008] CLJU 679; [2008] 1 LNS 679; [2009] 7 MLJ 681 at p. 702, Ramly Ali J (as he then was) held that:

> Opinions of experts are admissible to furnish the court with scientific information which is unlikely to be within the experience and knowledge of a judge (s. 451(1) of the Evidence Act 1950).
>
> Where expert testimony is required on certain matters including technical matters relevant in allegations of professional negligence (in this case, against a consulting engineer), it is not open to the court to decide on such matters in the absence of such evidence.

[66] Before proceeding to the next issue, I would like to refer to the summary of the experts' opinions.

[67] Summary and conclusions by Dr Toh are as follows:

(i) the lowest factor of safety for an embankment or wall built over soft clay is immediately at end completion of construction. This is when pore water pressures are highest. The factor of safety increases with time as pore water pressures decrease. It therefore follows that the failure of the wall some 12 years after completion of construction must be due to additional forces such as rise in water pressures;

(ii) tests carried out of the pipes within the property shows leakages. It is however not known when leakages started,

(iii) post failure soil investigations show that the moisture content of the fill material above ground water level corresponds to fully saturated conditions;

(iv) rainfall was not particularly inclement over the month before failure and higher rainfalls in the past had not caused the wall to fail. Since rainfall over the month and days before collapse was not particularly inclement, a sudden rise in ground water from this source is unlikely;

(v) much is not known of the swimming pool. In particular how water from the pool is discharged outside the property;

(vi) the time for onset of the cracks in the facade of the retaining wall is not known. It could have occurred during backfilling or soon after completion of backfilling where some wall movements would have occurred; such movements would not have been large enough for failure of the wall;

(vii) saturation of the fill is likely due to infiltration of water into the ground from water leakages, from the pipes and perhaps from the swimming pool;

(viii) the results of the three-dimensional finite element analyses are fairly consistent with the actual behaviour of the wall provided the infiltration of water was at least 12 litre per hour. The analysis also showed that the wall remained stable until about eight years after start of sustained infiltration;

(ix) the estimated wall deflection of 36mm at end of wall construction may well exceed JKR's design movement criteria of 15mm. This exceedance does not mean that the design is inadequate. There is in fact no specified limit on wall displacement in the design of retaining walls in well accepted codes such as British Standards and Hong Kong GeoGuide 3. The finite element analysis shows that the forces induced in the piles corresponding to 36mm deflection are all within allowable limits (SLS), *ie*, stable conditions;

(x) it would appear that Zaidun Leng did design for rise in groundwater of at least 2m in addition to provision of a sub-surface drain behind the stem of the wall. However, water infiltration sustained over the years can result in a build-up of water pressures to higher than that designed for; and

(xi) in conclusion, the most likely cause of the wall failure some 12 years after it was constructed is the accumulated effect of continual water infiltrating into the ground.

[68] Summary and findings by Ir Chen Chean Sin (SD1)

(i) the retaining wall was built *circa* 2007. The wall was stable since then. In 2010, construction activity was carried out where the bungalow had been renovated and extended. It is expected that some excavation and backfilling work had been done in order to carry out the extension works. As the work was carried out in a relatively constraint area, it could be difficult to compact the backfill material properly. The soil behind the retaining wall could have been disturbed and depending on the quality of the backfilling work, the soil strength of the backfill ground could be affected to a certain degree. In addition, the piling machine moving around and the vibration caused by the piling work may also have some effects to the existing retaining wall;

(ii) unfortunately, there was no report or any information on the wall performance or any defects report of the extension works which may give some indications of the wall status after the extension works. It is assumed that the wall remained in stable condition with no other defects such as tilting, cracks ... *etc*, until December 2018 where the wall collapsed. It was informed that heavy rain had been continued over the night before the wall collapsed on 6 December 2018;

(iii) for a wall which can be remained in stable condition for more than ten years, the sudden collapse will be most likely caused by external unexpected loads at this localised stretch. This can be proven by the retaining walls at adjacent lots which have similar design and constructed at the same period. No reports/complaints on wall damage such as tilting, cracks on wall or ground surface ... *etc*, for the adjacent stable retaining wall were received;

(iv) it is possible that the soil strength of the "compacted fill" behind the retaining wall had reduced due to the excavation and backfilling after the extension work. The subsoil could have also been loosened and become more permeable for the infiltration of surface water;

(v) increase of water pressure acting onto the wall is also a factor which contributed to the instability of the wall. Based on the groundwater monitoring results from the installed standpipe at site, the groundwater level is expected at RL 4.6m which is below the base of the wall at normal condition. During rain, the surface runoff will seep into the subsoil which saturate the subsoil and also may rise up the groundwater level. If there are cracks or voids on the surface drains, the amount of water seeping into the subsoil will be more and much faster. Other than the rain water, if there is leakage of buried pipes, the situation will become worse. As weep holes are normally provided for retaining wall, the built up ground water behind the wall will be able to discharge easily and preventing from any extra pressure acting onto the wall. However, if the weep holes are clogged or partially clogged, it is likely that water pressure can be built up behind the wall and induced extra load onto the wall. When the extra load exceeded a threshold value, it triggers the failure and causes the wall to collapse;

(vi) a retaining wall which was built approximately in year 2007 had been remained stable at site for more than ten years until a localised stretch collapsed on 6 December 2018. Site visit on 1 April 2022 noticed that for the adjacent retaining walls which had not been affected by the localised collapsed still remained in stable condition. Based on the provided information and assessment results, it was found that the wall should be in stable condition under normal condition. However, the wall will become unstable when subjected to additional forces;

(vii) it is likely that at this localised stretch, the soil strength of the backfill material behind the wall could be affected after the renovation and extension works done at site. With the water seeped into the subsoil due to heavy rain and/or probable leakage from the buried pipes, the water pressure exerting onto the wall increased and this further aggravated the situation. Once the load due to the increase of water pressure exceeded the threshold value, it triggered the failure and caused the wall collapsed; and

(viii) bundle L does not constitute technical evidence, although some parts are inconclusive, and this court has a duty to determine the findings of fact.

[69] Findings of the plaintiff's expert witness: Ir Cheah Siew Wai

(i) the following scenarios are considered in the FEM analyses which are Case 1: Retaining wall is supported on piles with fixed-head condition. Analysis suggests that concrete pile heads failed to

support the retaining wall and Case 2: Retaining wall is supported on piles with free head condition. Analysis suggests that concrete piles failed to support the retaining wall. This means that in both scenarios, based on the design of the retaining wall provided, the retaining wall was not stable;

(ii) based on Jabatan Kerja Raya (JKR) Guidelines for Slope Design, rigid retaining structures shall be designed to have a minimum factor of safety (FOS) value of 1.5, and the minimum service life shall be minimum 60 years as per BS7543 (see Appendix C);

(iii) table 4 presents the summary of FEM analyses which results show that the concrete piles are found inadequate to support the retaining wall with a FOS value of 0.997. This would have been the condition of the retaining wall since it was constructed as no modifications were made to the retaining wall since its completion. It should also be noted that a retaining wall with FOS of less than 1.0 (with FOS of less than 1.0, retaining wall should have collapsed) may still stand due to variation in soil parameters, loading condition, groundwater level fluctuation, *etc.* However, the retaining wall would be standing with an extremely low safety margin which made it at risk of collapsing when conditions change;

(iv) the functionality of the retaining wall is to contain soils within the bungalow lot and shall last for its design life span. Collapse of retaining wall could only happened if there is change of loading condition (*ie*, topping up of platform level, increase of hydrostatic pressure due to groundwater level increase) or change in the support condition (*ie*, erosion of earth at retaining wall toe, excavation of soils at retaining wall toe outside of bungalow lot);

(v) as the weight of swimming pool and koi pond filled with water is lighter than the weight of the soil, it is our opinion that the swimming pool and koi pond did not cause additional weight or load to the retaining wall, and as such did not cause the collapse of the retaining wall;

(vi) in addition, as swimming pool and koi pond are supported on their own piles. After the collapse incident, the swimming pool and koi pond are still intact and supported on piles without collapsing;

(vii) this further indicates that the swimming pool and koi pond were not causing additional loads to the retaining wall and the swimming pool and koi pond are well supported by the piles installed during the house renovation works; and

(viii) as explained above, there was no alteration of platform level within the bungalow lot, the reticulation pipe leakage showed negligible water leakage, there were no significant soil erosions at the retaining wall toe and no soils excavation at the retaining wall toe by others. As such, these were not factors which caused the collapse of the retaining wall. The retaining wall collapsed in December which is typically a rainy season. It is likely that the retaining wall collapsed due to increment of groundwater level over the rainy season, which increased the load/weight on the retaining wall to a level more than could be supported by the retaining wall due to its low FOS value.

[70] Conclusions by Ir Chen Chean Sin:

(i) no renovation works were done on the property by the former house owner;

(ii) renovation works done by the house owner from around October 2010 to July 2011 did not involve topping up of earth level to the garden platform above the boundary retaining wall. The swimming pool and koi pond were supported on their own piles;

(iii) collapse of boundary retaining wall and pond slopes took place on 6 December 2018;

(iv) failure of pond slopes and upheaval of pond slopes toe occurred. Structures and facilities that were not supported on piles had collapsed together with the pond slopes;

(v) swimming pool structures which are supported on their own piles are found still standing after the collapse of boundary retaining wall and pond slopes;

(vi) there was no alteration of platform level within the bungalow lot, the reticulation pipe leakage showed negligible water leakage, there were no significant soil erosions at the retaining wall toe and no soils excavation at the retaining wall toe by others. As such, these were not factors which caused the collapse of the retaining wall;

(vii) the retaining wall collapsed in December which is typically a rainy season. It is likely that the retaining wall collapsed due to increment of groundwater level over the rainy season, which increased the load/weight on the retaining wall to a level more than could be supported by the retaining wall due to its low FOS value; and

(viii) section 5.0 presents the independent analyses review which results show that the concrete piles was found unable to support the retaining wall with a FOS value of 0.997, which is significantly lower than the JKR Guidelines requirement of 1.5.

[71] Finding by Dr Wong Fook Keong:

(i) the retaining wall was constructed at the lowest lying part of a catchment area of houses with highest elevation of RL 22.5m and lowest elevation at RL 4m to RL 5m. The highest elevation and lowest elevation within the effective catchment area is about 300m apart. "RL" stands for "reduced level" and it is a survey term for the level or elevation of any location or point with reference to a survey datum or benchmark. The defendant's design had only allowed a maximum height of the GWL of 2.0m above the retaining wall base;

(ii) it was agreed by all the investigators that the retaining wall had failed because of the rise of the groundwater level ("GWL") behind the retaining wall. I have computed that the retaining wall would become critically unstable when the height of the GWL reaches 2.7m above the base of the retaining wall and SSP had computed that the retaining wall would achieve the critical instability state when the GWL reaches 3.0m above the base of the retaining wall. CMKS has opined that retaining wall failed when the GWL behind the retaining wall had risen but the failure was because of the inadequate pile fixity to the retaining wall base. Dr Toh had opined that the retaining wall had failed due to the rise of the GWL behind the retaining wall and the reason of this GWL rise was because of a leaked pipe within the bungalow's compound;

(iii) the investigators' consensus is that the GWL behind the retaining wall had breached the 2.0m of water height allowed for by the defendant in its design and this means that the retaining wall design is inadequate. I have explained that Dr Toh's theory that the water from the leaked pipe was the source and cause of the GWL rise was invalid. Dr Toh's theory rests on his premise that the water from the leaked pipe would remain behind the retaining wall and with further contribution of pipe leakage, the GWL would rise during the period of 12 to 13 years after the retaining wall was built until the retaining wall collapsed in 2018. I have shown that there is a clear route or means for any infiltrated water in the ground behind the retaining wall to escape or permeate *via* the soil layer beneath the retaining wall base to the nearby pond/lake and the golf course. This will invalidate Dr Toh's theory that the groundwater from behind the retaining wall has no means of escape;

(iv) the major contribution/source of the water that had seeped from the highest point within the catchment area to the bungalow site is from rain water which had infiltrated into the ground. The transient (or dry weather) GWL will rise within the effective catchment area and the seepage will flow towards the lowest location of the bungalow site. The seepage flow is driven by the hydraulic gradient between the highest and lowest elevation at these locations (the phreatic head at each of these locations);

(v) when there is prolonged and heavy rain, the GWL within the effective catchment area will rise to its highest level above the transient GWL. The seepage flow will surge towards the bungalow site and because of the nature of the construction of the retaining wall, there is restricted escape route for the seepage water to leave the bungalow site and when the capacity of the escape route to discharge the seepage water is exceeded, the GWL level behind the retaining wall will rise. This will exert large lateral hydrostatic water behind the retaining wall and if this GWL reaches the level of from 2.7m to 3.0m above the retaining wall base, the stability of the retaining wall will be compromised. With the repeated stressing/weakening of the retaining wall over the period of 12 to 13 years, the retaining wall had collapsed in 2018;

(vi) the undeniable fact in this case is that the retaining wall had collapsed, and all the investigators have agreed that it is due to the rise in the GWL which had exerted huge lateral hydrostatic pressures behind the retaining wall and causing it to fail. The source of the groundwater seepage is clear and the pipe leakage at the bungalow lot is only a trickle in relation thereto. It then follows that the defendant had failed in its duty to exercise the due skill and care to properly assess/determine the level which the GWL behind the retaining wall at the bungalow's site would be raised during its service life to perform a safe and proper retaining wall design; and

(vii) the retaining wall failure was actually foreseeable and preventable at the material time and at the design stage by an experienced geotechnical engineer. It is the case that either the defendant does not have the requisite design knowledge and experience (*ie*, the skill part) or if he has such design knowledge and experience, he was careless to have overlooked the topographic conditions and the hydro-geological conditions that would result in high GWL build-up behind the retaining wall to be designed (*ie*, the care part). The result was an unsafe retaining wall design being done for the bungalow. The retaining wall failure was foreseeable and could have been prevented if the defendant had exercised due skill and care.

[72] It is relevant for this court to consider whether all the statements in bundle L amount to an expert opinion. I am of the opinion that bundle L does not prevent this court from making a finding of fact. This finding aligns with the expert opinion of DW1, in which he states that bundle L does not constitute technical evidence, although some parts are inconclusive, and this court has a duty to determine the findings of fact.

[73] All of the experts have affirmed an affidavit stating that they can draw certain conclusions based on the documents and information provided to them. In Bundle L, all of the experts agreed that:

(i) item 9 – There is no reported evidence of clogged or burst pipes in the plaintiff's property;

(ii) item 10 – There is no reported evidence of weepholes in the plaintiff's retaining wall being clogged;

(iii) item 11 – There is no reported evidence of the plaintiff's renovation works of the bungalow proper in 2010 to 2011 having disturbed the soil strength behind the retaining wall in a way that could affect the structural integrity of the retaining wall; and

(iv) item 12 – If the plaintiff's renovation works of the bungalow proper in 2010 to 2011 had affected the structural integrity of the retaining wall, signs of distress on the retaining wall would have manifested very soon after the renovation works in 2010 to 2011.

[74] I refer to items 11 and 12 above. I believe that the statements do not indicate that the plaintiff has proof that the renovation works on the bungalow proper have not disturbed the soil strength behind the retaining wall, which could affect the structural integrity of the RW.

[75] My understanding is that all of the experts agreed before this court, that there is no reported evidence that the plaintiff's renovation works of the bungalow proper in 2010 to 2011 had disturbed the soil strength behind the retaining wall in a manner that could affect the structural integrity of the retaining wall. In other words, it indicates a lack of evidence since the expert will form an opinion based on the documents presented to them.

[76] The plaintiff also failed to call the contractor responsible for the renovation and construction of the swimming pool to provide evidence regarding the extent of soil extraction, the design of the pool, including its weight. In my opinion, this evidence would enable the experts to assess the impact of the renovation on the soil's strength behind the retaining wall, which could affect the wall's integrity. If the report had been given to the experts, para. 13 of bundle L would not state 'There is no information as to whether was soil top-up in the plaintiff's property during the renovation works including swimming pool work in 2010 to 2011'.

[77] The inconsequential nature and lack of complete documents or reported information to be assessed by the experts have led them to reach an agreed opinion by stating – "There is no reported evidence" and "There is no information" as can be seen in paras. 9, 10, 11, 13, 15 of bundle L.

[78] Therefore, this court cannot ignore other factual evidence, such as the intervening event of whether the renovation of the bungalow, including the swimming pool, has affected the structural integrity of the RW, and the issue of clogging along with soil top-up on the plaintiff's property during the renovation works in 2010 to 2011.

Appointment Of A Geotechnical Engineer Before The Renovation Works Carried Out By The Plaintiff

[79] Learned counsel for the defendant did question PW1 as to whether she had appointed a geotechnical engineer to assess whether the swimming pool and the pond were feasible structures on the property in 2010. In reply to this question, the PW1 said:

> Chegne: I'm not very sure on the technical thing, but I'm very sure that you know, before we build, we engaged the engineers, we submit all the plans to MBSA, Majlis Perbandaran Shah Alam. So, everything was approved before we do the renovation.

[80] Following that, the testimonies of the PW1 are as follows:

> JH: Who is this engineer?
>
> Chegne: I cannot remember. It's so long ago. I can't remember.
>
> JH: I put it to you and you can agree or disagree that you actually never had an engineer to assess the, whether it's feasible to put these structures on your home. Do you agree?
>
> Chegne: I don't agree.

[81] Having reviewed the evidence from PW1 regarding whether she appointed a geotechnical engineer to assess the feasibility of the swimming pool and the pond as structures on the property in 2010, I find that there was no evidence to suggest that any study was conducted by the plaintiff for this purpose.

[82] I further refer to the opinion of DW1, in which he confirmed that there was no report on the wall performance and also states as follows.

> The wall was stable since then. In 2010, construction activity was carried out where the bungalow had been renovated and extended. It is expected that some excavation and backfilling work had been done in order to carry out the extension works. As the work was carried out in a relatively constraint area, it could be difficult to compact the backfill material properly. The soil behind the retaining wall could have been disturbed and depending on the quality of the backfilling work, the soil strength of the backfill ground could be affected to a certain degree. In addition, the piling machine moving around and the vibration caused by the piling work may also have some effects to the existing retaining wall.
>
> Unfortunately there was no any report or any information on the wall performance or any defects report of the extension works which may give some indications of the wall status after the extension works.

[83] PW1 was also asked about the use of heavy machinery during the renovation works:

JH: Sure. Do you know what, then, can you agree with me that excavation involves heavy machinery and vibration and possible soil movement? That one can you agree with me?

Chegne: I guess so.

[84] The plaintiff started the renovation works in 2010 and finished them in 2011. The relevant testimonies are as follows:

JH: This includes I think a swimming pool and a pond and a Koi fish pond and a barbeque outdoor sitting area. Is that right?

Chegne: Yes.

JH: Would you agree with me that to construct a swimming pool and a pond, you would need to do excavation works? Excavation, digging works. Digging work. Digging on the soil, excavation work.

Chegne: Yes.

[85] I hold that the renovations in 2010 carried out by the plaintiff were an intervening event. The plaintiff failed to comply with item 4 of the deed of mutual covenant and did not appoint a consultant or any qualified professional to renovate her house, including inspecting the current foundation and structural design to ensure that all renovations were properly engineered.

[86] It is important for the plaintiff to carry out the study, knowing that the property is next to the retaining wall. If the study has been done, the report should be presented before this court.

[87] Before the plaintiff can commence the renovation works, the plaintiff has a duty to enquire as to the extent that she can dig the soil, piling works and perform excavation works to construct the swimming pool, knowing that there is a drainage blanket underneath the ground and whether the retaining wall can support the weight of the swimming pool. Based on the report from DW1, this court cannot rule out that the excavation and backfilling work, carried out to perform the extension works, disturbed the stability of the retaining wall.

[88] Regarding item 12 of bundle L, there is no evidence that the plaintiff has regularly inspected the retaining wall to identify its evident signs. This court agrees that the plaintiff did not maintain the retaining wall.

[89] This court noted that from the hot tubbing session, all of the experts agree that there is no information regarding whether there was a soil top-up on the plaintiff's property during the renovation works, including swimming pool works in 2010 to 2011 as stated in item 13 of bundle L.

[90] This court is of the view that the issue of whether there was a soil top-up in the plaintiff's property during the renovation works, including swimming pool works in 2010 to 2011, is to be determined based on evidence from the plaintiff. The question was put to PW1 during cross-examination:

JH: Ok. Now I'm going to put this statement to you. You can agree or disagree with me. Same level from photos of the soil does not mean no soil added. Would you agree with me? Just because it's the same level doesn't mean no additional soil was added.

Chegne: Not. I don't agree.

JH: That's ok. Would you agree with me that if you add soil and compact it to the same level, additional soil was added, but it will still look like it's the same level? Do you want me to repeat my question?

Chegne: Yes, please.

JH: When you add additional soil onto the property and you compact it, press it down and then if to make sure everything is levelled, it will like everything is levelled, but actually there is additional soil, right?

Chegne: Yes, definitely.

JH: So, just by looking at the photos and saying that the level of soil is the same doesn't conclusively prove that there is no soil add.

Chegne: That's true.

[91] Based on the testimony above, I believe that the issue of additional soil added to the property is a question of fact. The burden is on the plaintiff to call her contractor, who undertook the renovation works.

[92] I further refer to item 17 of bundle L (list of agreed opinions of experts) – The defendant used the same design for the plaintiff's retaining wall as with all other houses in that area, based on the drawings.

[93] There is no evidence of a design report indicating the design parameters used for the retaining walls. In fact, the retaining wall has remained standing for over ten years. Based on the opinions of the expert, this court finds that the fact that the defendant used the same design for the plaintiff's retaining wall as for all other houses in that area, as shown by the drawings, constitutes unpleaded facts.

[94] Issue raised by the defendant that should be taken seriously by this court is whether the plaintiff pleaded a material fact regarding the cause of the retaining wall's collapse.

[95] Having reviewed the extensive reports prepared by all experts and submissions from both parties, in determining the origin of the groundwater, I find that the case of *Ketua Pengarah Jabatan Kerja Raya v. Strongkota Development Sdn Bhd & Another Appeal* [2016] 3 CLJ 741 is relevant and has guided this court in assessing the evidence. The COA had decided that:

> [16] ... It is trite law that parties to a suit are bound by what have been pleaded in their respective pleadings. To further refine the dispute, parties would normally agree with each other as to what are the issues to be tried. Although the pleadings would expressly bind parties, it has the effect of also limiting the power of the adjudicating court, in that the decision of the court, at the end of the trial of the suit, must be in consonance with what had been pleaded by the parties. The reliefs granted by the court must therefore be tailor-made, so to speak, to fit into what had been agreed by the plaintiff as per his statement of claim, in particular based on his cause of action ...
>
> As such, pleadings have the effect of not only binding the parties, *inter se*, but it also operates to ensure that the court only grants the reliefs that have been prayed for as pleaded as forming the plaintiff's causes or causes of action. There may be exceptions to this rule of the thumb, but only rarely will the courts depart from this crucial rule of civil litigation.

[96] Whereas in *Bruce v. Oldham Press Ltd* [1936] 1 KB 697, it was held that:

> The word 'material' means necessary for the purpose of formulating a complete cause of action, and if any one 'material' fact is omitted, the statement of claim is bad.

[97] I reproduce below O. 18 r. 8(1) of the RC:

> Matters which shall be specifically pleaded
>
> A party shall in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, any relevant statute of limitation, fraud or any fact showing illegality:
>
> (a) which he alleges makes any claim or defence of the opposite party not maintainable;
>
> (b) which, if not specifically pleaded, might take the opposite party by surprise; or
>
> (c) which raises issues of fact not arising out of the preceding pleading.

[98] The plaintiff, in her testimony, agreed that her action against the defendant is based on the retaining wall collapsing due to its inadequate design, as shown in the notes of the proceedings.

> JH: Just want to understand your position, if you can confirm. Your position is that the retaining wall collapsed because of the inadequate design of the wall. Is that correct?
>
> Chegne: Yes, correct.

JH: Why are you taking action against Gamuda? Why don't I just make it simple and ask you that.

Chegne: Ok, I am claiming against Gamuda as a developer to build the wall and they didn't do the correct thing. According to my witness, they say that the wall did not built according to specifications.

[99] This court also agrees with learned counsel for the defendant that evidence of unpleaded facts, even if not objected to, cannot be considered if it constitutes a radical departure from the pleaded case.

[100] The Federal Court in *Iftikar Ahmed Khan v. Perwira Affin Bank Bhd* [2018] 1 CLJ 415; [2017] MLJU 1765 held:

> [36] The cases cited by both counsel to us clearly show that the law on the first question posed by the appellant is settled. It is this. In a case where the matter or material facts are not pleaded but evidence is led without objections at trial, the court is duty bound to consider such evidence although it may be a departure from the pleading. It has the effect of curing defect in the pleading. In such a case the opposite party is not taken by surprise, prejudiced, embarrassed or misled. The exception is where the evidence represents a radical departure from the pleading and is not just a variation, modification or development of what has been alleged in the pleading. *Datuk Hamzah Abdul Majid v. Omega Securities Sdn Bhd* [2015] 9 CLJ 677 is an illustration of a case where there was a radical departure from the pleading. In that case, loan, which was not a pleaded defence but evidence of it was adduced without objection was rejected as a defence as it was a radical departure from pleading, not just a variation, modification or development of what had been alleged in the pleading.

[101] Therefore, this court finds that the plaintiff failed to prove the defendant is in breach of duty.

[102] In *Johara Bi Abdul Kadir Marican v. Lawrence Lam Kwok Fou & Anor* [1980] CLJU 199; [1980] 1 LNS 199; [1981] 1 MLJ 139, the Federal Court held:

> It was all a matter of proof and that until and unless the plaintiff has discharged the onus on her to prove her case on a balance of probabilities, the burden did not shift to the defendant, and no matter if the defendant's case was completely unbelievable, the claim against him must in this circumstances be dismissed. With respect, we agree with this judicial approach.

Doctrine Res Ipsa Loquitur

[103] It is important for this court to determine whether the plaintiff can rely on the doctrine *res ipsa loquitur.*

[104] The plaintiff is relying on the case of *Teoh Guat Looi v. Ng Hong Guan* [1998] 4 CLJ 416; [1998] 4 MLJ 525, which refers to the decision of *Lloyde v. West Midlands Gas Board* [1971] 1 WLR 749.

[105] The defendant argues that the doctrine does not apply to this case and relies on the case of *Ahmad Jaafar Abdul Latiff v. Dato' Bandar Kuala Lumpur* [2014] 9 CLJ 861; [2014] MLJU 1913, which held that the doctrine does not establish negligence but merely infers it. It was also held that the doctrine does not apply if the defendant did not have exclusive control over the property alleged to have caused the damage.

[106] Having considered the submissions of both learned counsel for the plaintiff and the defendant, I find that the plaintiff cannot rely on the doctrine of *res ipsa loquitur*, and it does not apply in this case. Not only does the defendant lack exclusive control over the property, but the plaintiff also carried out extensive renovations on the land prior to the collapse of the retaining wall.

Conclusion

[107] I have carefully reviewed all cause papers, the evidence presented at trial, and submissions from both parties. Based on the totality of the evidence and materials before this court, I find that the plaintiff has failed to discharge the burden of proof to establish her claim against the defendant.

[108] Therefore, the plaintiff's claim is dismissed with costs of RM50,000, subject to allocator.